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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

COLORADO RIVER INDIAN TRIBES,
Petitioner,

v.

GERALD ARANSON, et al.,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF ARIZONA'S BRIEF IN OPPOSITION

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ARGUMENT

THE COURT OF APPEALS' DECISION IS CORRECT.

In deciding that Congress did not convey the bed of the Colorado River to the Colorado River Indian Tribes, the Court of Appeals correctly applied this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981). *Montana* held that Congress is presumed "to hold such land in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an 'equal footing' with the established States", *Id.* at 551, unless Congress intended otherwise "in clear and especial words", or "definitely declared or otherwise made very plain", or "unless the claim confirmed in terms embraced the land under the waters of the stream." *Id.* at 554.

Applying the above holding to this case, we find the following language in the Act creating the Colorado River Indian Reservation:

> All that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock *on the Colorado River*, containing about seventy-five thousand acres of land, shall be set apart for an Indian reservation for the Indians of said river and its tributaries.
> *Act of March 3, 1965*, 13 Stat. 541, 559 (emphasis supplied).

It is noteworthy that this Act was passed subsequent to California's statehood in 1850 and could not have conveyed the western half of the river bed which already belonged to California.[1] Moreover, nowhere in the Act is there any reference to the conveyance of the river bed to the Indian Tribes in either "clear or especial words" or in words "definitely declared or otherwise made very plain". The meaning

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[1] The argument that the boundary between Arizona and California was not established until the Boundary Compact of 1966 is specious. The boundary had always been the Colorado River. The Boundary Compact was necessary only because of the meanderings of the Colorado River over the years, making the physical boundary difficult to ascertain. See Article 1 of the *Arizona California Boundary Compact*, 80 Stat. 340 (1966).

of the Congressional Act is clear. The mere reference to landmarks *on the Colorado River* cannot be construed to mean the conveyance of the river bed.

Petitioner argues that an Executive Order of May 15, 1876 referred to the "west bank of the Colorado" and therefore the United States conveyed the river bed to the Indian Tribes. That argument is fallacious. Firstly, *Montana* made it clear that only Congress can convey the river bed. Secondly, the reference to the west bank at most included the river in the reservation but did not convey the title to the river bed.[2] The inclusion of the river, itself, within an Indian reservation did not convey the river bed to the Indians. *Montana v. United States, supra.* Nor did the inclusion of a lake within an Indian reservation convey the lake bed to the Indians. *United States v. Holt State Bank*, 270 U.S. 49 (1926).

Petitioner's reliance upon *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), is misplaced. In *Montana*, this Court carefully explained that *Choctaw* is a singular exception in an established line of cases and that "the conveyance of the river bed in *Choctaw* was based on very peculiar circumstances . . . ." *Id.* at 555, n. 5. This Court explained that, in the Choctaw treaty, which was similar in content to the Cherokee treaty, the United States "pledged that 'no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation . . . and that no part of the land granted to them shall ever be embraced in any Territory or State'. [Citation omitted]." *Id.* at 555, n. 5. Like the Crow treaties in *Montana*, the surrounding circumstances and language of the Congressional Act of 1865, creating the Colorado River Indian Reservation, in no way come close to the facts in *Choctaw*.

Next, there is no "public exigency" to require Congress to depart from its policy of reserving ownership of beds

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[2] "[T]he mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the river bed part of the conveyed land, especially when there is no express reference to the river bed that might overcome the presumption against its conveyance." *Montana v. United States, id* at 554.

under navigable waters for the future states. Petitioner acknowledges that the Colorado River Indian Tribes existed mainly on farming. The inclusion of the Colorado River in the reservation assures them a supply of water for agriculture. In fact, this water supply is assured under the implied reservation of water rights doctrine. See *Arizona v. California*, 373 U.S. 546 (1963). See also *Arizona v. California*, _____ U.S. _____, 103 S.Ct. 1382 (1983). That doctrine in no way implicates the ownership of the river bed. *Id.* at 597. Unlike the facts in *Alaska Pacific Fisheries v. United States*, 248 U.S. 18 (1918), the Indians' rights to water or to fishing are in no way impaired by the states' ownership of the river bed. *Alaska Pacific Fisheries*, therefore, has no application here. Moreover, the right of a riparian owner to use water from the river does not carry with it the ownership of the river bed of a navigable stream. Most certainly, the grant of water rights by Congress does not convey the bed of that navigable stream. On the contrary, the water users' rights are always subject to the sovereign's navigational servitude from which Arizona's ownership of riverbed is derived. *United States v. Appalachian Power Co.*, 311 U.S. 377 (1940).

Lastly, petitioner's argument concerning its aboriginal claims is not properly before this Court. Since that issue was first raised in the Court of Appeals by the Indian tribe, the Court of Appeals' decision specifically remanded it to the district court for its decision.

CONCLUSION

The decision of the Court of Appeals is correct. There is no basis for the certiorari to be granted.

Respectfully submitted this 11th day of October, 1983.

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